Supreme Court, U.S.
FILED
AUG 2 3 2002
OFFICE OF THE CLERK

(3)

No. 01-1665

In the Supreme Court of the United States

ALFRED M. COHEN, EXECUTOR OF THE ESTATE OF SAMUEL GINSBURG,
Petitioner,

v.

PAINEWEBBER, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

STANLEY M. CHESLEY
Counsel of Record

1513 CENTRAL TRUST TOWER
5 WEST FOURTH STREET
CINCINNATI, OH 45202
(513) 621-0267
(513) 381-2375 FAX

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

10 pp

STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 was set forth at page ii of the Petition for Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

Page

Parties to the Proceedings i

Table of Contents ii

Table of Authorities iii

Argument 1

I. This Court recognizes Rule 19(b) is a factual determination 1

II. The Respondents confirm there is a meaningful conflict among the circuits 2

III. The conflict between the circuits is sufficient to warrant a review by this Court 4

IV. The Sixth Circuit's Decision is Incorrect On The Merits 5

V. The Federal Arbitration Act is not an Issue for Consideration 6

Conclusion 6

TABLE OF AUTHORITIES

Page

Broussard v. Columbia Gulf Transmission Co.,
398 F.2d 885 (5th Cir. 1968) 2

Keweenaw Bay Indian Community v. Michigan,
11 F.3d 1341 (6th Cir. 1993) 3

Koopers Company, Incorporated v.
The Aetna Casulty and Surety Company,
158 F.3d 170 (3rd Cir. 1998) 3

National Union Fire Insurance Company of Pittsburgh,
Pennsylvania v. Rite Aid of South Carolina,
Incorporated, 210 F.3d 246 (4th Cir. 2000) . . . 3, 4

Provident Trademens Bank & Trust Co., v. Patterson,
390 U.S. 102, 88 S.Ct. 733 (1968) 1, 2

The Travelers Indemnity Company v. Dingwell,
884 F.3d 629 (1st Cir. 1989) 1, 2

ARGUMENT

I. This Court recognizes Rule 19(b) is a factual determination

Admittedly, this Court has not expressly stated whether Rule 19(b) is subject to an abuse of discretion review or de novo review.[1] However, an earlier opinion of this Court discussing Rule 19(b) clearly recognizes that a Rule 19(b) determination is subject to an abuse of discretion standard of review. In *Provident Trademens Bank & Trust Co. v. Patterson,* this Court stated, "[t]he decision whether to dismiss (i.e., the decision whether the person is indispensable') must be based on factors varying with different cases..."390 U.S. 102, 119, 88 S.Ct. 733, 743, 19 L.Ed.2d 936 (1968) Furthermore, this Court stated "[w]hether a person is 'indispensable' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation." 390 U.S. 102, 118. Appellate courts have read this Court's opinion to require Courts of Appeal to apply an abuse of discretion review when considering Rule 19(b). The First Circuit, for example, in *The Travelers Indemnity Company v. Dingwell,* 884 F.3d 629 (1st Cir. 1989), interpreted *Provident* to require an abuse of discretion review.

> We favor the position of the District of Columbia and Ninth Circuits. Rule 19(b) determinations must be based on fact-specific considerations. See Provident Tradesmens

---

[1] The lack of a determination by this Court establishing the standard of review is the very reason the Petitioner seeks a writ of certiorari.

> Bank & Trust Co. v. Patterson, 390 U.S. 102, 119, 88 S.Ct. 733, 743, 19 L.Ed.2d 936 (1968).....[I]nstead, they involve the balancing of competing interests and must be steeped in "pragmatic considerations." *Id.* The district court, which is "closer to the arena," is in the preferred position to make these decisions. See Broussard v. Columbia Gulf Transmission Co., 398 F.2d 885, 889 (5th Cir.1968). We hold that its Rule 19(b) conclusions are entitled to deference, and will not be reversed unless they amount to an abuse of discretion.

The Travelers Indemnity Company v. Dingwell, 884 F.3d 629, 635 (1st Cir. 1989).

The reasonable conclusion to draw from *Provident* is that a Rule 19(b) determination is fact specific and subject to an abuse of discretion standard of review. The Respondent chooses to ignore this reality. Additionally, the Respondent further chooses to ignore the First Circuit's interpretation and application of *Provident* in *Travelers*. As evidenced by the decisions cited in the Petition for writ of Certiorari, many federal appellate courts review Rule 19(b) determinations de novo instead of applying an abuse of discretion standard. These appellate courts are wrong and require the guidance that only this Court can provide.

II. The Respondents confirm a meaningful conflict exists among the circuits.

The Respondent, in its brief, confirms that a conflict exists among the circuits. For instance, the Respondent admits that "[a]s to the Fourth Circuit, the cited case does

purport to apply an abuse of discretion standard to a Rule 19(b) determination." (Brief in Oppos. 7) This standard, moreover, is in direct conflict with the Sixth Circuits' de novo standard of review. *Keweenaw Bay Indian Community v. Michigan*, 11 F 3d 1341, 1346 (6th Cir. 1993). The statement by the Respondent is a single example of conflict among the circuits. In addition, the Respondent fails to dispute that the Third Circuit applies a standard of review that is different than the standard applied by the other Circuits. The Third Circuit reviews 19(a) determinations de novo and applies an abuse of discretion standard to 19(b) determinations. *Koopers Company, Incorporated v. The Aetna Casulty and Surety Company*, 158 F.3d 170 (3rd Cir. 1998.) Finally, the Fourth Circuit recognizes the disparity of standards of review among the circuits. Footnote 7, in *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Rite Aid of South Carolina, Incorporated* states,

> **The circuits vary greatly in the standard of review to apply to a district court's Rule 19 determination**. The Ninth and Tenth Circuits apply an abuse of discretion standard to the district court's determination under both 19(a) and 19(b).... [T]he Sixth Circuit applies an abuse of discretion standard to the district court's analysis under 19(a) and a de novo standard to its analysis under 19(b). ...[T]he First, Second, Third, Fifth, Eighth, Eleventh, and D.C. Circuits do not appear to have decided on a standard for a district court's determination under 19(a) and apply an abuse of discretion standard to its determination under 19(b)....[T]he Seventh Circuit has expressly declined to adopt a standard of review at all. (emphasis added)

National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Rite Aid of South Carolina, Incorporated, 210 F.3d 246, 250 f.n. 7 (4th Cir. 2000).

The Respondent does not respond to the circuit court conflict. Instead, the Respondent selectively discusses the merits of a few of the cases cited by the Petitioner, and expresses the Respondent's misguided perception that the standard of review is immaterial and that the circuit courts are prone to apply a different standard than the standard stated in written opinions. *See* Brief in Oppos. 7 (4th and 6th Circuits are claiming to apply one standard but actually apply a different standard). The Respondent's skepticism regarding the ability of circuit courts to understand and apply the different standards of review is troublesome. It, however, underscores the point of the Petitioner that confusion exists regarding the appropriate standard and that this Court should provide the necessary guidance. By arguing the merits of selected cases, the Respondent only distracts this Court from focusing on the undisputed circuit court conflict that exists.

III. The conflict between the circuits is sufficient to warrant a review by this Court.

A decision by this Court is important not only for the underlying action but for all cases involving Rule 19 determinations. This Court's decision directly will influence the outcome of the present case. In the Sixth Circuit's decision, the court recognized that a finding that the Respondent was an indispensable party was reasonable because it concluded that the Petitioner would suffer prejudice and piecemeal litigation without joinder. *Op. at 12.*

The Sixth Circuit only could reverse the trial court by applying a de novo review. A de novo review permitted the Sixth Circuit to substitute its judgment concerning the interpretation and application of the facts for the interpretation and application of the facts made by the trial court. If the Sixth Circuit had applied an abuse of discretion review, it could not have substituted its judgment for the judgment of the trial court, and it would have affirmed the trial court's finding that the Respondent was a necessary party.

This Court's acceptance and decision regarding the appropriate standard of review is important to resolving future Rule 19 litigation. Appellate practice and procedure relies heavily on the correct standard of review. Without a predetermined standard of review it is difficult for attorneys and judges to determine whether a case has merit regarding an appeal.

IV. The Sixth Circuit's Decision is Incorrect On The Merits.

As stated in the Petition for Writ of Certiorari, Rule 19 involves a factual determination. The four factors outlined in Federal Rule of Civil Procedure 19(b) require fact-finding. The first factor requires the district court to determine the prejudice to the parties. The only means that a district court has to assess prejudice is to review the facts surrounding each of the parties. The second factor requires the district court to determine if the prejudice can be lessened. Again, this requires the district court to assess the unique circumstances of each of the parties. The third factor requires an assessment concerning whether a judgment rendered in a party's absence would be adequate. The district court only can obtain this finding by analyzing the relationship of the parties. The district court only can determine this relationship by

examining the facts. The fourth factor involves the availability of an adequate remedy if the district court dismisses the case. This finding obviously involves a factual determination of the available remedies. *See e.g.*, Op. at 13 (panel decision finding that state court provides an alternative forum).

V. The Federal Arbitration Act is not an Issue for Consideration.

The Petitioners always have recognized the importance of the Federal Arbitration Act. However, the present question for review does not involve the Federal Arbitration Act. The only question for review is what is the appropriate standard of review for Rule 19. The Respondent, none the less, continues to raise the Federal Arbitration Act. This topic only serves to confuse and distract from the main issue of the appropriate standard of review. Indeed the Respondent is unable to find any case or authority to support its apparent position that the Federal Arbitration Act supercedes the Federal Rules of Civil Procedure.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.